IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No 165 of 1999

with

TAX APPEAL NO. 170 OF 1999

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

INCOME TAX OFFICER

Versus

GUJARAT NARMADA VALLEY

Appearance:

In both the appeals:
MR MANISH R BHATT for Petitioner
MR JP SHAH for Respondent No. 1

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE A.L.DAVE

Date of decision: 01/09/1999

ORAL JUDGEMENT

Per Thakker, J.

Being aggrieved and dissatisfied by the order passed by the Income Tax Appellate Tribunal, Ahmedabad in ITA Nos. 2811 and 2812 of 1997 on December 11, 1998, the present appeals are filed by the revenue under Section 260A of the Income tax Act, 1961 (hereinafter referred to as "the Act").

According to the revenue, the following substantial question of law deserves to be determined by this Court:

"Whether on the facts and in the circumstances of the case, the Income tax Appellate Tribunal was right in law in holding that the assessee could not be held to be an assessee deemed to be in default u/s 201 (1) and thereby cancelling the orders passed by the assessing officer u/s. 201 (1) and 201 (1A) of the Act ?"

Shortly stated, the facts are that the assessee Gujarat Narmada Valley Fertilizers Company Limited ("company" for short) filed its annual returns under Section 206 of the Act for financial year 1995-96 on May 24, 1996. A survey was carried out at the premises of the assessee company on July 19, 1996 by the Income Tax Officer (ITO) (TDS). As a result of the survey, ITO found that certain payments were made to the employees on which tax was not deducted at source though in accordance with the provisions of the Act, it was to be deducted. The employer, therefore, was liable to be dealt with under Section 201 inasmuch as assessee can be said to be a "deemed defaulter" as he had not deducted the tax at source.

Details regarding payments which were made by the employer to the employees were as follows :

Period from	Particulars	Rate	Amount
1976	Vehicle allowance for vehicles of employees.	Rs.380/-to 2425/-p.m. vehiclewise.	2.47.90.929
1.7.86	Cash canteen assistance	Rs 550 per employee per month.	1,98,78,159

1976 Medical reimbursement. Rs.410/- per 1,37,10,680
family p.m.

1.7.86 Progressional books Rs. 75 to 52,67,594
allowance 650/- a month.

1.1.84 Gardening allowance. Rs.175/- to 29,89,547
700/- p.m.

1.7.94 Birthday gift. Rs.251/- to 9,69,111
501/- per
employee.

July 90 Safari allowance Rs.1300 to 14,87,600
2500 once in
2 years.

ITO (TDS), Baroda vide his order dated March 14, 1997 held that payments were made without reimbursement and accounting and hence, the provisions of Section 192 of the Act would be applicable. Considering the relevant items, ITO found that there was violation by the employer of the provisions of the Act and since tax was not deducted at source, the assessee was liable to be dealt with according to law. In view of the said finding, he observed as under :

" It is,therefore, held that the assessee company is an assessee deemed to be in default within the meaning of section 201 (1) read with section 192 of the Income tax Act in respect of tax of Rs. 2,36,45,731/-."

He also passed the order under Section 201 (1A), wherein it was stated:

"Since the assessee has been held as an assessee in default in respect of an amount of Rs. 2,36,45,731/- ,this default of the assessee attracts the provisions of section 201 (1A) also which empowers the assessing officer to levy interest of 15% per annum. Accordingly, interest of Rs. 51,72,501/- under section 201 (1A) is levied."

Being aggrieved by the order passed by ITO, an appeal was preferred by the company to CIT (Appeal-II) Baroda. CIT (Appeals) by his order dated June 18, 1997 partly allowed the appeal to the extent of interest, but dismissed it as against the amount of tax. While dealing with the matter, the appellate authority was of the opinion that the ITO had not committed any error of law in holding that the employer was under a duty to deduct payments which were made to the employees and by not deducting the amount of tax, the employer had violated provisions of Section 201 of the Act. The employer was,therefore, liable to pay tax. Regarding interest, however, in paras 5 to 8, the appellate authority observed :

"5. I have considered the issue raised by the income tax officer and the arguments of the appellant. Prior to A.Y. 1974-75, deduction was given from salary to person who wanted a motor car, motorcycle, a moped or a cycle. As the legislature treated the expenditure incurred on going from residence to office and back as expenditure in connection with employment, such deduction was allowed. Administering these provisions prior to A.Y. 1973-74 was quite difficult and therefore with effect from A.Y. 1973-74, the legislature introduced the concept of standard deduction in the cases involving assessment under the head salary. It is thus clear that the legislature has provided deduction for going from residence to office and back in the form of standard deduction. Therefore, the argument that expenditure was incurred on such a travelling which was official is incorrect. Only expenditure in connection with travelling for official purpose has to be allowed but it is the duty of the employer to ensure that reimbursement is limited only to expenses incurred wholly and exclusively for the purpose of employment. This responsibility has not been discharged by the employer. Further, the payment of such amount to each and every employee of the appellant without reference to the function performed by them leads to the conclusion that the payments were made to the employees as a remuneration but in the garb of reimbursement. As far as medical allowance is concerned, the reasoning given by the Income tax Officer in his order is correct and is accordingly upheld .For the reasons and the legal, provisions discussed above, the finding of

the ITO in respect of reimbursement of conveyance expenses, gardening allowance, library allowance,safari allowance canteen subsidy allowance and birth day gifts are held to be proper and confirmed.

6. The second appeal. is in respect of charging of interest under section 201 (1A) of the I.T.Act amounting to Rs. 51, 72,501/-.The appellant's case was that as the appellant was in appeal against the order under section 201 (1) of the I.T. Act,there was no question of charging any interest. It was also argued that no opportunity was granted by the A.O. while charging the interest. It was also stated that as the payments in respect of which short deduction has been worked out is not chargeable to income tax, no interest should be levied. It was further argued that there was no monthly default and that if there is a charge of interest the charge of interest should be restricted to the amount of shortfall worked out if any, under section 201 (1) of the I.T. Act.

7. I have considered the facts of the case and examined the records of the Income tax officer. The show cause notice for the charging of interest was given by the Income tax Officer. But there is no basis for charging interest on monthly defaults. The interest could only be charged on the basis of shortfall worked out under section 201 (1) of the I.T.Act and on no other basis. The income tax officer is,therefore, directed to amend his order in respect of charging interest accordingly.

8. In the result, the appeal against order under section 201 (1) of the I.T.Act is confirmed, while the appeal against the charging of interest is partly allowed."

Against the order of the appellate authority, two appeals were filed before the Income tax Appellate Tribunal. Before the Tribunal, it was argued by the assessee that the assessee was of the opinion that the payments made to the employees were not subject to payment of tax. Such opinion was based on decisions of several High Courts. It was also contended that the department also ,all through out, was of the view that such payments were not liable to tax. This was evident from the fact that

though proceedings were initiated against the assessee in 1992-93, they were not pursued further. It was also argued that in respect of one employee- Kirit Ramniklal Raval, library book allowance of Rs.2200/- which was added by ITO under Section 143 (1) was rectified by granting deduction and by holding that there was a mistake on the part of the department as the allowance was not liable to be taxed. In the light of facts and circumstances and relying upon various decisions, the Tribunal observed :

> "We are of the opinion that the departmental authorities have not proved that the action of the assessee in not deducting the tax on the above payments was a mala fide one. On the other hand, in view of the fact that the proceedings initiated by the AO for A.Y. 1992-93 and 1993-94 in respect of the alleged short deduction of TDS were not further pursued, we are of the opinion that the assessee under the bona fide belief, did not deduct the tax at source from the disputed payments and and it could not be held to be an assessee deemed to be in default under section 201 (1)."

Accordingly, the Tribunal quashed the order passed by the ITO as also by the appellate authority.The Tribunal also observed that since the order passed under Section 201 was liable to be set aside, it was not necessary to adjudicate on merits regarding taxability or otherwise of the amounts which were received by the employees.

Various contentions were raised before us by the learned counsel for the revenue. It was submitted that the Tribunal has committed an error of law apparent on the face of record in not properly construing the provisions of Sections 192, 200 and 201 read with Sections 15, 16 and 17 of the Act. According to the learned counsel, provisions of Section 201 are in two parts. The first part relates to default on the part of employer. Under that part, only failure can be taken into consideration viz. whether there is violation on the part of the employer in not deducting the amount. As soon as the fact situation comes into existence, the provision would operate notwithstanding the presence or absence of intention of the employer. Legislative intent is clear that the employer must deduct the amount of tax while making payment to his employees. If he fails to do so,

he would be deemed to be an assessee in default in respect of such tax and certain consequences would ensue. Learned counsel further submitted that under the first part, the employer is liable to pay tax as well as interest and it is not open to the employer to contend that he committed a default bona fide or there was disobedience in discharge of his duty honestly or with good intention. Then comes the second part.
It provides for penalty. It was submitted that at the second stage, it is open to the employer to contend that there was no mala fide intention on his part and in absence of mens rea, he may not be ordered to pay penalty on tax and interest . Thus, the second part is independent of the first part. Learned counsel submitted that error of law which has been committed by the Tribunal was that in deciding the matter, the Tribunal invoked the concept of good faith on the part of the employer and by not holding the assessee liable even in respect of payment of tax as well as interest. This was not permissible. The counsel,therefore, submitted that the matter deserves consideration and it requires to be admitted.

Mr. Shah, on the other hand, submitted that the provision must be read as a whole in its entirety with the object for which it has been enacted. He submitted that it cannot be disputed that liability to pay tax is not of the employer but of the employee. If it is so, the argument proceeded, it is incumbent on the part of the employer to consider relevant provisions of law, decisions on statutory provisions by various High Courts as well as by the Apex Court and the fact as to whether payment which has been made to the employees is otherwise taxable . If payment is not taxable, obviously, there was no question of deduction of tax by the employee at source and the case would not fall within the mischief of Section 201 if the employer does not deduct at source as, in accordance with law, he could not have deducted any amount of tax.

Drawing our attention to the fact that even according to the department, such payments were not subject to tax, he submitted that though proceedings were initiated against the assessee in the past, but no further action was taken. In this connection, he draw our attention to the order passed by the Tribunal in which the said fact is reflected. In the order of the Tribunal, it was observed that notices were issued by the department in the past, but they were not pursued further. It is observed that the assessee was regularly deducting tax from the payment of salary to the employees. For the first time, on

September 24, 1993, the Assessing Officer issued notice for financial year 1992-93 asking the assessee to show cause as to why he should not be charged with interest under Section 201 (1A) of approximately Rs. 3,50,000/-. The proceedings were , however, subsequently not pursued further. The Tribunal noted that in these circumstances, it was presumed by the assessee that the proceedings were dropped. Again, in 1993-94, notice was issued on May 16, 1994 and on an explanation being furnished by the assessee, the proceedings were not continued. It was, therefore, submitted that it could not be said that the Tribunal had committed an error of law which can be said to raise a "substantial question of law" under Section 260A. If according to the Tribunal, there was a bona fide belief on the part of the assessee in forming an opinion that the amounts which had been paid to the employees were not liable to be taxed, there was no question of deduction by the employer.

Mr. Shah further submitted that the Court is here called upon to consider the provisions of Section 201 which states as to who can be said to be a "deemed defaulter". Obviously, the Court would be loathe to give interpretation by holding a person "deemed defaulter" unless the case falls within four corners of law. A deeming provision of such nature which brands an employer to be a "deemed defaulter" requires to be strictly construed and if in the light of the facts before the Tribunal, it has recorded a finding which can be said to be a pure finding of fact that there was reasonable and bona fide belief on the part of the assessee that the amounts which had been paid by the company to its employees could not be said to be salary under the Act and hence, no deduction could be made, can it be said that such a finding raises a "substantial question of law" which requires to be determined by this Court under Section 260A of the Act ? He also submitted that this was coupled with the fact that with regard to certain payments, proceedings had been finalised and it was not held to be income under the Act. According to Mr. Shah, the finding that the company acted bona fide and honesty, is a finding of fact and obviously such finding cannot be challenged under Section 260A of the Act. In that case, it cannot be said that there was violation of Section 201 by the employer. If the contention of the revenue is accepted, not only the court holds the employer as "deemed defaulter" within the meaning of Section 201 of the Act, but it interferes with a finding of fact regarding bona fide and honest belief on the part of the employer, which is not permissible.

In the facts and circumstances of the case, in our

opinion, no substantial question of law can be said to have arisen in this case in respect of the order passed by the Income tax Appellate Tribunal. Though our attention was invited by both the learned counsel to several decisions of the Supreme Court, of this Court as well as of other Courts, in our view, it is not necessary to deal with them in the present case. It may be that ambit and scope of first part of Section 201 (1) and the proviso may be different. At the same time, however, it cannot be said that the Tribunal has committed an error of law in not considering the circumstances including the circumstance that even though notices were issued in 1993-94, the matter was not pursued further and that a rectification order was passed in favour of an employee. Ultimately, it cannot be gainsaid that liability is of employees. Even in respect of an individual employee , when an order of rectification was made by the authorities and deduction was made, the Tribunal, in our opinion, cannot be said to be wrong in recording a finding that there was honest and bona fide belief on the part of the assessee that regarding other allowances also, the case would not fall under Section 201 if the amount was not deducted at source.

It was stated at the Bar that from 1997-98, the company has started deducting the amount of tax at source from the amounts which are to be paid to its employees in respect of disputed allowances.

For the foregoing reasons, without entering into larger question and without laying down any principle of law, we are of the view that by allowing appeals and setting aside the orders passed by the Authorities below, the Tribunal has not committed any error of law and no substantial question of law arises for consideration of this Court.

The appeals, therefore, deserve to be dismissed and are accordingly dismissed. No order as to costs.

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